(9)

No. 06-173

FILED
DEC 19 2006
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SAN CARLOS APACHE TRIBE,

Petitioner,

v.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC; PHELPS DODGE INCORPORATED; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

REPLY BRIEF OF PETITIONER TO ASARCO LLC

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PETITIONER'S REPLY BRIEF TO ASARCO

Pursuant to Rule 16.6 of the Rules of the Supreme Court of the United States, Petitioner, San Carlos Apache Tribe ("Apache Tribe" or "Tribe"), replies to ASARCO, LLC's Brief in Opposition to the Petition for Writ of Certiorari to the Arizona Supreme Court ("ASARCO Resp.").[1]

A. Introduction

In 1985, following this Court's decision in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Ninth Circuit Court decision in *San Carlos Apache Tribe v. State of Arizona*, 721 F.2d 1187 (9th Cir. 1983) and the Arizona Supreme Court decision in *United States v. Superior Court*, 144 Ariz. 265, 697 P.2d 658 (1985), the Apache Tribe, and the United States as its trustee, filed claims in the Arizona general stream adjudication[2] for all rights to the Gila River mainstream and its tributaries necessary to fulfill the purposes of the San Carlos Apache Reservation ("Reservation") as a permanent Tribal homeland for the Tribe.

Both the Tribe and the United States made it clear in all previous proceedings that the United States had additional claims to the mainstream of the Gila River to fulfill the purposes of the Reservation and that the Tribe had claims of its own that would be filed once the status and scope of the state proceeding was clarified as to the McCarran Amendment.[3]

1. The Apache Tribe simultaneously files (1) a Consolidated Reply to the Response in Opposition filed by the United States ("U.S. Reply"); and (2) a Consolidated Reply to the Responses in Opposition filed by Phelps Dodge Corporation, the City of Safford, and the Gila Valley Irrigation District ("Consolidated Reply").

2. The Arizona general stream adjudication of the Gila River system and source is a McCarran Amendment proceeding, 43 U.S.C. § 666.

3. *See* Joint Appendix Vol. I in No. 81-2147, *Arizona v. San Carlos Apache Tribe* (October Term, 1982) at 206 (Transcript of proceedings before Arizona adjudication court on February 23, 1981) and Response of the United States to the Arizona general adjudication court's Order of February 23, 1981, filed February 25, 1981, Appendix to Reply to ASARCO ("Reply App.") at ___.

Here, ASARCO and others assert that 5 years later in 1990, the Tribe made a "strategic" decision "to withhold making" its claims in the *Globe Equity Court* when it filed its motion to intervene and complaint in intervention in the ongoing *Globe Equity Decree* ("*Decree*") enforcement action.[4] Further, ASARCO and others assert that the *Globe Equity Court* ruled against the Tribe when the Tribe purportedly attempted to "expand its rights" under the Decree to establish "continuous flow"[5] to the Gila River, and when the Tribe sued to require the United States to retain "stored water" owned by the United States in the San Carlos Reservoir.[6] ASARCO is wrong.[7]

B. The Apache Tribe is Entitled to Enforce the *Globe Equity Decree* and Claim Its Additional Water Rights in the Adjudication

ASARCO claims that the Tribe cannot make it defense of inadequate representation in the Arizona stream adjudication and also assert the water right of the United States to 6,000 acre-feet of water for the San Carlos Apache Reservation.[8] ASARCO inappropriately merges the **alternative arguments** presented by the Tribe in the Arizona stream adjudication as to why the Tribe could claim additional water rights to the Gila River mainstream. The Tribe first argued, that in construing the conduct of the United States in good faith, the right obtained by the United States in the *Globe Equity Decree* was not the full extent of the water rights of the Tribe. In the alternative, the Tribe argued that if the Arizona stream adjudication court determined that the *Globe Equity Decree* was a negotiated settlement of all of the Tribe's water rights claims to the Gila River mainstream (which it did), the United States so grossly

4. *See* Brief of ASARCO in Opposition ("ASARCO Resp.") at pp. 6-7.

5. ASARCO Resp. at 2.

6. ASARCO at 3-4.

7. ASARCO also mischaracterization the Apache Tribe's water supply. This is briefed in the Tribe's Response in Opposition to Phelps Dodge Cross-Petition at 13-15 and will not be repeated here.

8. ASARCO Resp. at 5, 18.

and inadequately represented the Tribe as to destroy the element of privity required for the Decree to have *res judicata* effect. The Tribe is entitled, as beneficiary of the waters held by the United States under the Decree, to enforce that Decree.

C. Prior Rulings and Cases Did Not Decide the Tribe's Ability to Claim Water Rights to the Gila River Mainstream

1. Globe Equity No. 59

ASARCO cites *United States v. Gila Valley Irrig. Dist.*, 804 F.Supp. 1, 10 (D. Ariz. 1992), *aff'd in part and rev'd in part*, 31 F.3d 1428 (9th Cir. 1994), for the proposition that the Tribe sought to "expand" the water rights obtained by the United States for the Tribe under the *Globe Equity Decree*.[9] This is incorrect.

The non-Indian water users upstream from the Reservation had developed the practice of diverting the entire mainstream of the Gila River into their canals, and rediverting the return flow so that the natural flow Gila River mainstream water for Apache irrigation was unreliable and so degraded in quality as to be described as an agricultural drain by the *Globe Equity Court*.[10]

In 1990, supported by the United States, the Tribe sought to establish a minimum flow in the Gila mainstream so that it could reliably receive 6,000 acre feet of water decreed to the United States under the *Globe Equity Decree* at an appropriate time with adequate quality and quantity to allow the Tribe to grow its traditional crops. The United States' expert had testified that a live stream was necessary. The Court declined to require a live stream be maintained above the Reservation.[11] Instead, it entered a water quality injunction.[12]

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9. ASARCO Resp. at 2.

10. *See United States v. Gila Valley Irrig. Dist. ("U.S. v. GVID")*, 920 F. Supp. 1444, 1448-1449 (D. Ariz. 1996).

11. *United States v. Gila Valley Irrig. Dist.*, 804 F. Supp. 1, 10 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 31 F.3d 1428 (9th Cir. 1994).

12. *U.S. v. GVID*, 920 F. Supp. at 1454-1455.

When the *Globe Equity Court* stated that "the Decree was intended as a complete statement of the rights of the various parties to the waters of the Gila River,"[13] it was not addressing any additional claims of the Apache Tribe to waters of the Gila River, nor was it asked by the Apache Tribe to do so. It simply decided that a "continuous flow" was no provided by the Decree. The parties to the Decree and the *Globe Equity Court* were well aware that the water rights claims of the Tribe to the Gila River mainstream were pending in the Arizona stream adjudication.[14]

2. *San Carlos Apache Tribe v. United States*

When the United States drastically drained or lowered San Carlos Reservoir, it caused damage to Apache graves, threatened and endangered fish and birds dependent on the Lake and threatened public health. The Tribe filed suit in the *Globe Equity Court* to require the United States to retain a minimum pool of "stored water" which the United States owned in the Reservoir to comply with federal law. The *Globe Equity Court* did not consider the question of whether federal law required the United States to prevent the types of problems alleged by the Tribe as an enforcement action under the Decree and dismissed the complaint without prejudice for lack of jurisdiction under Article XIII of the Decree.[15] In dismissing the complaint, the *Globe Equity Court* stated,

> The complaint **does not state a claim based on water rights granted by the Gila River Decree**. The Court, therefore, declines jurisdiction to hear this matter under Globe Equity No. 59 and dismisses the complaint without prejudice. If it appears that the Decree may

13. *U.S. v. GVID*, 804 F. Supp. at 10.

14. *See* Appendix of ASARCO to Response Brief in Opposition ("ASARCO App.") at 1-2. ("However, the Apache Tribe has been and will continue to litigate its claims . . . in State Court in the State of Arizona 'Gila River Adjudication' . . . which is now pending in the Mariocopa Superior Court.").

15. *See* Order of the United States District Court for the District of Arizona dated May 10, 1999, Appendix to Apache Tribe's Petition ("App.") at 310a-311a (emphasis added).

need to be modified based on resolution of these claims by another court, the parties may petition this Court at that time.[16]

The Tribe was not seeking additional rights for itself under the Decree, but rather was attempting to require the United States to use its own water in the Reservoir located on the San Carlos Reservation to protect the wildlife, the Apache graves and the public health under federal law.

Although the case was refiled in federal district court, it was not refiled in the *Globe Equity* case. The deciding court found that the purpose for which Congress appropriated money to construct the Coolidge Dam, was to capture flood water to irrigate the lands of the United States' SCIP project downstream, which it ruled was not subject to cultural and environmental laws enacted later by Congress.[17]

ASARCO mischaracterizes the Tribe's suit against the United States as the Tribe attempting to secure more water for its own uses, in an effort to escape the effect of the *Globe Equity Decree*. This is simply wrong. The *Globe Equity Court* ruled that it would not hear any of the Tribe's additional claims to the mainstream of the Gila River, but rather, that the Tribe must make those claims in another forum.[18]

D. The Tribe Did Not Make a Strategic Choice Concerning Its Claims to the Gila River Mainstream in 1990

By reference to a 1983 ruling by the *Globe Equity Court* against the Gila River Indian Community ("GRIC"), ASARCO argues that the *Globe Equity Court* had ruled that the Apaches could not file actions in that court for inadequate representation by the United States in 1935.[19] ASARCO is wrong.

16. *Id.*

17. *See San Carlos Apache Tribe v. United States*, 272 F.Supp. 2d 860 (D. Ariz. 2003), *aff'd in part*, 417 F.3d 1091 (9th Cir. 2005).

18. This would be in accordance with the requirements of *Arizona, et al. v. San Carlos Apache Tribe*, 463 U.S. 545; 103 S. Ct. 3201 (1983) (*"Arizona v. San Carlos"*), that the water rights claims of the Tribe are to be made in the State court adjudication.

19. ASARCO Resp. at 6.

Before the entry of the Decree in 1935, GRIC had filed a motion to intervene on its own behalf in the *Globe Equity* case. The Court denied GRIC's motion. The 1983 Court found that GRIC had failed to file a timely appeal to that denial 48 years earlier.

The *Globe Equity Court's* 1983 ruling was based upon GRIC's specific factual circumstances, and not those of the Tribe. By holding that the 1983 ruling applied to the Tribe, the Arizona Supreme Court determined the *res judicata* effect of the *Globe Equity Decree*, but denied the Tribe the right to defend against it.[20] This was based upon a 1983 court decision that had neither applied to the Tribe, nor to which the Tribe was a party. This is a straightforward denial of due process.

E. The Tribes are Entitled to Challenge Prior Decrees in the Arizona Stream Adjudication

In *Arizona v. San Carlos*, the tribes raised the concern before this Court that requiring inclusion of prior decrees in the final comprehensive adjudication of the water rights of the Gila River system and source under Arizona Revised Statute ("A.R.S.") 45-257(B)(1) would, *inter alia*, deprive the tribes of due process as to such prior decrees. The State parties replied to this Court that "as is true of western water rights adjudications generally, this statute requires the state court to 'accept' determinations of water rights in prior decrees as *prima facie* evidence, **which can be rebutted** by evidence adduced by persons who were not parties to the prior decree."[21] Respondents retreat from this interpretation here.

ASARCO cites certain cases for its proposition that the Arizona stream adjudication court must honor the *Globe Equity Decree* unless the *Globe Equity Court* or another federal appellate court reverses or modifies the effect of the Decree.[22]

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20. *See* U.S. Response at 11-13 and Tribe's Motion for Reconsideration to Arizona Supreme Court dated February 24, 2006 (Supp. App. at 14-16), for further discussion.

21. Reply Brief for Petitioners in No. 81-2147, *Arizona v. San Carlos Apache Tribe*, p. 19, n. 29.

22. ASARCO Resp. at 11-14.

However, the cases by cited by ASARCO confirm that the *Decree* would be honored by another court **only** when the elements of res judicata were found to exist by the reviewing court. *See e.g. Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("A final judgment on the merits of an action precludes **the parties or their privies** from relitigating issues that were or could have been raised in that action."); *Plotner* at 1166 ("**Finding the additional elements of res judicata present** and therefore concluding that the doctrine of res judicata barred collateral attack on Judge Lindsey's decision.").

Respondents have the burden of proof when using *res judicata* as an affirmative defense against the Tribe. The cases cited by ASARCO support the Tribe's position that the Arizona stream adjudication court should have required them to meet their burden to prove all the elements of *res judicata*, and to permit the Tribe under fundamental notions of due process, the opportunity to present its arguments regarding the lack of these elements.[23]

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23. ASARCO's reference to *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259 (2001), makes it clear that a person that is inadequately represented in a prior action may assert claims in a subsequent action and thereby provide a defense to *res judicata* of the previous action by demonstrating a lack of privity. "If plaintiffs were not proper parties to that judgment . . . res judicata cannot defeat their claims." *Id.* The plaintiffs making claims in *Stephenson* were not referred back to the court that entered the original judgment to determine if there was adequate representation as the Arizona Supreme Court inappropriately did in this case. *See also, Lapin v. Shulton*, 333 F.2d 169, 172 (9th Cir. 1964) ("considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there."). *See also, Restatement (Second) Judgments*, § 78, which provides that "[r]elief from a judgment must be obtained by means of a motion for that purpose in the court that rendered the judgment unless relief may be obtained more fully, conveniently, or appropriately by some other procedure. [Emphasis added]. In this case, relief can only be accorded in the State stream adjudication. The United States agrees that the *Globe Equity Court* could not provide such relief. *See* U.S. Resp. at 13.

F. The Tribe's Water Rights Claims Are Appropriately Brought Before the State Adjudication Court

In *Arizona v. San Carlos*, the United States suggested that separate federal court adjudications for the tribes would be more efficient and would be incorporated into the Arizona stream adjudication under Arizona law. The State petitioners disagreed.

> First, it stands in open contradiction to this Court's holding that 'the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals [i.e., 'the avoidance of piecemeal adjudication of water rights in a river system']. Though obstensibly seeking a 'clearer and more generalized rule', the United States actually seeks to avoid the clear holding of *Colorado River*. The government's admission that its proposal will result in 'some piecemealing' of water rights adjudication is directly contrary to the McCarran Amendment's preference for comprehensive adjudication **of all conflicting water rights** in the 'elaborate procedures for allocation of water and adjudication of conflicting claims to that resource' that 'several Southwestern States have established. . .'[24]

Both Respondents and the Arizona Supreme Court seem to retreat from this position.

ASARCO asserts that the Tribe's additional water rights claims to the Gila River mainstream belong before the *Globe Equity Court*, as the claims were brought by other tribes in *Arizona v. California*, 460 U.S. 605 (1983), and *Nevada v. United States*, 463 U.S. 110, 120, 103 S.Ct. 2906 (1983).[25] These cases do not support ASARCO. First, *Arizona v. California* is an interstate stream adjudication in which this Court has original jurisdiction. The tribes in that case had no other forum with the

24. Reply Brief for Petitioners in No. 81-2147, *Arizona v. San Carlos Apache Tribe*, p. 14-17 [internal citations omitted] [emphasis added].

25. ASARCO Resp. at 15.

jurisdiction to entertain or adjudicate their claims to the Colorado River. Second, the additional water rights claims of the Pyramid Lake Paiute Tribe were brought before the Orr Ditch court in *Nevada*, because that court **was** the general adjudication of all rights to the Truckee River and its tributaries.[26] There was no state McCarran adjudication in these cases where the tribes were required to file their water rights claims. For the Apache Tribe, this Court has ruled that the adjudication of all of its rights to the Gila River system and source must be in the Arizona stream adjudication.[27]

G. The Doctrine of Prior Exclusive Administrative Jurisdiction Does Not Apply to This Case

ASARCO cites to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), *State Eng'r v. South Fork Band*, 339 F.3d 804 (9th Cir. 2003), and *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999),[28] for the proposition that the *Globe Equity Court* has prior exclusive jurisdiction regarding claims to the Gila River mainstream.[29] These cases do not support ASARCO.

In the above cited cases, the courts were addressing the ongoing enforcement and administration jurisdiction of the courts that entered prior decrees. *See South Fork Band* at 813 ("the questions presented in *Colorado River* only 'concern[ed] the effect of the McCarran Amendment upon the jurisdiction of the federal district courts ... over suits for *determination* of

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26. *Id.* at 120. ("The District Court then found that the *Orr Ditch* litigation 'was intended by all concerned, lawyers, litigants and judges, as a general all inclusive water adjudication suit which sought to adjudicate all rights and claims in and to the waters of the Truckee ... and required all parties to fully set up their respective water right claims.'") (internal citation omitted).

27. *See Arizona v. San Carlos.*

28. For questions related to the administration of the *Globe Equity Decree*, under the principles established by *Alpine Land & Reservoir Co.* and *South Fork Band*, the *Globe Equity Court* is clearly the appropriate forum.

29. ASARCO Resp. at 16-17.

water rights brought by the United States.' That is a question of *adjudication*. In contrast, the question here is one of *administration*.") (internal quotations omitted). Here, in contrast, the Arizona stream adjudication is not addressing exclusive jurisdiction for enforcement or administration of prior decrees. Instead, the Arizona stream adjudication is addressing **all** of the Tribe's water rights claims under the McCarran Amendment.

CONCLUSION

The Arizona stream adjudication must apply federal law and provide the Tribe with the due process right to defend its water rights claims.

For these reasons, the San Carlos Apache Tribe respectfully requests that this Court grant its Petition and issue a writ of certiorari as to Issue 1 and Issue 2 to the Arizona Supreme Court on the decision below.

Respectfully submitted,

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APPENDIX

APPENDIX A — RESPONSE OF THE UNITED STATES TO THE ORDER OF FEBRUARY 23, 1981

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY STATE OP ARIZONA

NO. W-1

IN RE: GENERAL ADJUDICATION OF THE RIGHT TO USE WATER IN THE SALT RIVER WATERSHED ABOVE GRANITE REEF DAM, EXCLUDING THE VERDE RIVER TRIBUTARY

RESPONSE OF THE UNITED STATES
TO THE ORDER OF FEBRUARY 23, 1981

The United States files this response to this court's order of February 23, 1981, which required the United States to submit a list of "agencies, beneficiaries, and others bearing [a] relationship to the United States" for which the United States would ultimately file a claim in this proceeding.

The United States, by filing this document does not concede that this court has jurisdiction over the United States, its agencies, beneficiaries, or others bearing a relationship to the United States, since this action may well not conform to the requirements of 43 U.S.C. 666, The McCarran Amendment. The United States would also point out that the doctrine of tribal sovereign immunity, as explicated in the case of *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), would oust this court of jurisdiction over the Indian tribes listed herein.

Appendix A

The United States is still troubled by the scope of this proceeding. There has been no definitive statement by petitioner or the State of Arizona concerning what geographic area and what interests in water – surface and subsurface – are intended to be adjudicated herein. Until such a definitive statement is made, the United States is powerless to challenge the jurisdiction of the court, since we cannot assert that this is *not* a general adjudication until we know what is to be adjudicated.

Given these uncertainties, the United States supplies the following list of federal agencies and Indian tribes for which it may file claims in the proceeding:

Federal Agencies

United States Department of the Interior

1. Bureau of Land Management

2. Water and Power Resources Service

3. National Park Service

4. Fish and Wildlife Service Department of the Defense

1. United States Air Force

2. United States Army Department of Agriculture

1. National Forest Service Indian Reservations

Appendix A

1. San Carlos Apache Indian Reservation

2. White Mountain Apache Indian Reservation

3. Tonto Apache Indian Reservation

4. Ft. McDowell Indian Reservation

5. Yavapai – Prescott Indian Reservation

6. Salt River Indian Reservation

7. Gila River Indian Reservation

8. Gila Bend Papago Reservation

9. Ak-Chin Pima-Maricopa Indian Reservation

10. Camp Verde Indian Reservation

Depending upon the geographic scope of these proceedings, and depending upon the interests to be adjudicated herein, the United States may or may not make claims on behalf of all the entities listed above.

The United States will file claims for the Indian Reservations listed for the United States' legal interest as a trustee of the water rights of the respective reservations. The Indian tribes have seperate equitable interests in the water rights of their reservations. The United States believes that certain of the Indian tribes may file claims in this proceeding which may differ from the claims that the United States will make for its interest as trustee.

Appendix A

Respectfully submitted,

s/ Steven E. Carroll
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APPENDIX B — ORDER OF THE SUPERIOR COURT OF PINAL COUNTY, STATE OF ARIZONA DATED FEBRUARY 23, 1981

Div.: 22

Date: February 23, 1981

Judge or Commissioner: HON. STANLEY Z. GOODFARB

Clerk: WILSON D. PALMER

Deputy: S. Sanders

IN THE MATTER OF THE DETERMINATION OF CONFLICTING RIGHTS TO THE USE OF WATER FROM THE GILA RIVER, BELOW ITS CONFLUENCE WITH THE SAN FRANCISCO RIVER, AND THE TRIBUTARIES OF THE GILA RIVER, INCLUDING THE SAN FRANCISCO RIVER, CHASE CREEK AND EAGLE CREEK

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Appendix B

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Clerk of the Superior Court
Pinal County

Clerk of the Superior Court
Maricopa County —
Lyndon Bolt

8.55 a.m. This is the time set for the hearing on all pending motions in cases, W-1, W-2, and WC-1. Mr. Hunsaker, Mr. Carroll, Mr. Swan, Mr. Schaper, Mr. Galbraith, Mr. Stephens, Mr. Weldon, Mr. Shrago, Mr.

Appendix B

Kolsrud, Mr. Jackson, Mr. Veeder, Mr. Sparks, Mr. Siler and Mr. Brauchli appear.

Robert Ferrara, Court Reporter, is present.

The first motion heard was the United States of America's Motion for an Extension of Time. Mr. Carroll and Mr. Kolsrud set forth their positions.

IT IS ORDERED granting the U.S.A.'s Motion for Extension of Time. The time for filing of claims by U.S. agencies, beneficiaries and others bearing relationship to the U.S. will be given until January 4, 1982 to file their claims. However, by June 1, 1981, the U.S. for and in behalf of its agencies, beneficiaries and others whom it appears for as trustee or such persons, parties or tribes for whom the Department of Justice of the United States of America has appeared but who desire to epresent themselves shall file a notice of their appearance in this Court and a notice of intention to file a claim by January 4, 1982. Their claims will not have to be filed until January 4, 1982. Failure to file such a notice and intention to file by June 1, 1981 will close off rights to be a claimant in this case.

FURTHER ORDERED that Mr. Carroll with the input from Mr. Sparks will prepare and submit an order to that affect to this Court for approval, settlement and signature.

Mr. William Veeder specifically advises the Court of his Presence the presence of Robert C. Brauchli and Ronny Lupe, chairman of White Mountain Apache Tribe and that it wishes this Court to be aware that such tribe will not appear and it

does not watt the Department of Justice to appear for it as it believes this Court is without jurisdiction. The Court advises Mr. Veeder, Brauchli and Lupe that they could appear and reserve the issue of jurisdiction and not run the risk of what non-appearance could mean. The Court further advises that they should reconsider and have until June 1, 1981 to appear. If they fail to appear by then, the Court will not be sympathetic to allowing them in later if and when its jurisdiction is upheld and will deem their failure to file will foreclose the tribe and all its members' rights.

Mr. Don Maughan speaks with regard to the status of this matter and the program to proceed with these cases with all deliberate speed.

IT IS ORDERED that Mr. Hunsaker prepare such orders with regard to the Salt, Verde and Gila rivers to implement the program suggested by Mr. Maughan including service.

The Buckeye Irrigation Company's Motion to Intervene and to File a Petition for Adjudication of Additional Rights in WC-1, the Gila River case, is heard at this time. John Schaper, Ralph Hunsaker and Stephen Carroll set forth their positions on this matter.

IT IS ORDERED granting the Motion and for Mr. Schaper to prepare and submit an order for the Court's signature.

Appendix B

FURTHER ORDERED that the Court Reporter, Robert Ferrara, shall prepare and submit a transcript of this morning's proceedings. The cost of this will be borne by the Department of Water Resources.

9:45 a.m. Court stands at recess.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF MARICOPA COUNTY, STATE OF ARIZONA DATED MARCH 24, 1982

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

Div.: 20

Date: 3/24/82

Judge or Commissioner: HON. STANLEY Z. GOODFARB

Clerk: WILSON D. PALMER

Deputy: S. Sanders

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

Ralph E. Hunsaker

Russell A. Kolsrud — A.G.

M. Byron Lewis/John B. Weldon

Joe P. Sparks

Z. Simpson Cox

Alvin H. Shrago

John S. Schaper

Appendix C

Tom Galbraith/Henry Ladendorff

Bill Stephens

Michael J. Brophy

Chester J. Peterson

Steven E. Carroll Dept. of Justice
10th E. Pennsylvania Ave. N.W.

William H. Swan
Dept. of Interior
2080 Valley Center, Ste. 200
Phoenix, AZ 85073

Chief Counsel
Ariz. Dept. of Water Resource
99 E. Virginia
Phoenix, AZ 85004

IT IS ORDERED approving and settling formal written Order, signed by the Court this date.

Appendix C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

W-1 Salt, W-2 Verde,
W-3 Upper Gila and
W-4 San Pedro

IN RE THE GENERAL ADJUDICATION OF ALL RIGHT TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

ORDER

The motions to dismiss filed by the United States and the San Carlos and Tonto Apache Tribes having been set for March 1, 1982, and having come on for hearing at that date, and it appearing to the Court that the United States Circuit Court of Appeals for the Ninth Circuit ruled on February 22, 1982, in the following cases, *San Carlos Apache Tribe of Arizona v. State of Arizona*, 80-5137, 80-5138, 80-5189, 80-5219; *Northern Cheyenne Tribe v. Adsit*, 79-3887; and *Navajo Nation v. State of Arizona*, 80-5471, 80-5837, that the Arizona Enabling Act and Constitution prevented the State of Arizona from exercising jurisdiction over Indian tribes, and the Court having been further informed that relief from these rulings will be sought before the United States Supreme Court,

Appendix C

IT IS HEREBY ORDERED:

1. The motions of the United States and the San Carlos and Tonto Apache Tribes to dismiss are held in abeyance pending a final determination by the United States Supreme Court of the *San Carlos Apache Tribe of Arizona v. State of Arizona*, 80-5137, 80-5138, 80-5189, 80-5219 and *Navajo Nation v. State of Arizona*, 80-5471, 80-5837.

2. Until such time as whatever action the United States Supreme Court takes is final, the United States and the San Carlos and Tonto Apache Tribes and any other party to these consolidated matters shall not be required to file any statement of claimants or other pleadings with this Court. This order is not intended nor does it allow the filing of statement of claimants by any other persons who have not filed statements of claimants in these proceedings by the dates previously set in any of the above-consolidated matters for the filing of statement of claimants. No date having previously expired for the filing of statement of claimants is reopened or extended by this order.

3. If final action by the United States Supreme Court determines that the State of Arizona may exercise jurisdiction in these consolidated matters the motions to dismiss by the United States, the San Carlos and Tonto Apache Tribes will be set for hearing at a time convenient on this Court's calendar approximately 30 days after the final decision by the United States Supreme Court.

Appendix C

4. This order is not intended nor does it determine or affect the rights of any parties in the above-consolidated cases. During the time that the motions of the United States and the San Carlos and Tonto Apache Tribes are held in abeyance all proceedings in these consolidated matters which have occurred prior to this order will be preserved, and the Department of Water Resources may continue to investigate, gather, prepare and process information but may not do so respecting any claim or potential claim of the United States on behalf of any Indian tribe until resolution of the cases cited above in this matter.

DONE IN OPEN COURT 24th day of March, 1982.

_____

JUDGE OF THE SUPERIOR COURT

APPENDIX D — ORDER OF THE SUPERIOR COURT OF MARICOPA COUNTY, STATE OF ARIZONA DATED MARCH 1, 1982

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

Div.: 20

Date: 3/1/82

Judge or Commissioner: HON. STANLEY Z. GOODFARB

Clerk: WILSON D. PALMER

Deputy: S. Sanders

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

Ralph E. Hunsaker

Russell A. Kolsrud — A.G.

M. Byron Lewis/
John B. Weldon

Joe P. Sparks

Z. Simpson Cox

Alvin H. Shrago

Appendix D

John S. Schaper

Tom Galbraith/
Henry Ladendorff

Bill Stephens

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Chief Counsel
Ariz. Dept. of Water Resources
99 E. Virginia
Phoenix, AZ 85004

Andrew R. Alex

10:10 a.m. This is the time set for the hearings on the Motions to Dismiss of the United States and the San Carlos and Tonto Apache Tribes. The following counsel appear: Ralph Hunsaker, Joseph Sparks, Steven Carroll, Z. Simpson Cox, Chester Peterson, M. Byron Lewis, Alvin Shrago, Andrew Alex, John Schaper, Bill Stephens and William Swan from the Dept. of Interior.

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Teresa Louis, Court Reporter, is present.

The Court announces that just prior to these hearings, the 9th Circuit on 2/22/82, ruled in a group of cases — the northern Cheyenne, San Carlos Apache and Navajo nation cases — which dramatically change the posture of the motions that were to be heard today. Under these circumstances, this Court wishes to hold this matter in abeyance until it can determine the finality of these recently decided cases. During the period of abeyance no further notice to anyone or other activity will be carried out on any of the cases, with the Court trying to preserve what has been done and the cost that has been expended until it is determined if these 9th circuit decisions will stand or perhaps on appeal will be superceded by a contrary 10th circuit decision.

Discussion is held by Court and counsel with counsel for San Carlos and Tonto Apache Tribe opposing the same. The attorney for the United States also opposes, but does not indicate his client would be prejudiced by any delay.

Mr. Sparks, Mr. Carroll, (Mr. Hunsaker, Mr. Lewis, Mr. Cox and Mr. Swan all set forth their positions on the record.

For all of the reasons set forth in the discussion between Court and counsel, the Court decides to hold hearings to Dismiss in abeyance until there has been a determination of the finality of three cases recently decided by the 9th Circuit which are as follows: *San Carlos Apache Tribe of Arizona v. State of Arizona*, 80-5137, 80-5138, 80-5189, 80-5219;

Appendix D

Northern Cheyenne Tribe v. Adsit, 79-3887; *Navajo Nation v. State of Arizona* , 80-5471, 80-5837 with Judges Chow and Ferguson in the majority and Judge Merrill dissenting.

The Court will hear the Motions to Dismiss 30 days after finality has been determined on the three cases. This can be either by a determination on the motion for rehearing which determines finality of determination by the United States Supreme Court, either denying a position of certiorari or some other manner, then the Court will deem that it is without jurisdiction and will then dismiss as to the federal parties and the indian tribes appearing herein.

The Court reiterates than the Court's determination to hold this matter in abeyance until that determination, shall not adversely affect the rights of any of the moving parties.

This order will suspend all previous orders setting filing dates for the filing of statements of claim as far as the parties moving herein. The order does not, however, allow in the interim additional parties to file statements of claim since those dates have already run. The Court is not, by holding this matter in abeyance, opening up filings to other parties in this matter. The Court also advises that it will not deem it advisable for the Department of Water Resources to proceed with notification, publication, service of summons on any of the other matters that they were presently contemplating serving on and going forward with which are W-2 and W-3.

Counsel, Hunsaker, shall prepare and submit an appropriate order, for the Court's approval, settlement and signature.

APPENDIX E — ORDER OF THE SUPERIOR COURT OF MARICOPA COUNTY, STATE OF ARIZONA DATED MARCH 1, 1982

IN THE SUPERIOR COURT

OF

MARICOPA COUNTY, STATE OF ARIZONA

Div.: 19

Date: 9/16/83

Judge or Commissioner: HON. STANLEY Z. GOODFARB

Clerk: VIVIAN KRINGLE

Deputy: S. Sanders

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

Philip J. Shea

John B. Weldon, Jr.

Chester J. Peterson

Michael J. Brophy/
Richard N. Morrison

Jim Johnson

Andrew Alex/
Howard Twitty

Appendix E

John Molloy

Barbara Crawford
Clerk's Office

Russell A. Kolsrud/
Susan M. Segal – A.A.G.

M. Byron Lewis

Joe P. Sparks/
Kevin Tehan

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Bill Stephens/David Pennartz

Appendix E

Kathleen Ferris
Water Rights Div.
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This is the time set for the hearing on a Motion to Vacate the Stay to set hearing dates on all pending motions and set a deadline for statements of claimants.

The following attorneys appear: Byron Lewis, Steven Carroll, Joe Sparks, Kevin Tehan, Bill Swan, John Weldon, John Schaper, Steven Christiansen, Andrew Alex, Mark Sifferman, Kathy Ferris, David Pennartz, Bill Stephens, Russell Kolsrud & James Johnson.

Teresa Louis, Court Reporter, is present.

Counsel Lewis, Carroll and Sparks set forth their positions on the record.

ORDERED taking the matters under advisement.

Upon consideration of the motion, responses and oral argument and for the reasons discussed in open court,

IT TS ORDERED vacating the stay imposed on 3/24/82 in the above-entitled actions and ordering the same to proceed with reasonable and deliberate process.

Appendix E

FURTHER ORDERED that a hearing on the previously filed motions to dismiss and any new motions to be dismissed to be filed be held on 12/16/83 at 1:30 p.m. in courtroom 402 on the fourth floor of the central court building of this court.

The parties may file supplementary memoranda to their previously filed motions or new motions by 5:00 p.m. on 12/21/83. All responses thereto shall be filed by 5:00 p.m. on 11/18/83 and any replies to the responses shall be filed by 5:00 p.m., 12/2/83.

The Court at this time believes that a setting of a deadline for the filing of Statements for the federal or tribal claimants would be premature and should only be done if necessary after the hearing on the motions.